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IN THE

Supreme Court of the United States

METRO-GOLDWYN-MAYER STUDIOS, INC., *ET AL.*,

Petitioners,

v.

GROKSTER, LTD., *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL ACADEMY OF RECORDING ARTS & SCIENCES, RECORDING ARTISTS' COALITION, THE COUNTRY MUSIC ASSOCIATION, INC., THE GOSPEL MUSIC ASSOCIATION, THE HIP-HOP SUMMIT ACTION NETWORK, JAZZ ALLIANCE INTERNATIONAL, INC, THE RHYTHM & BLUES FOUNDATION, SESAC, INC., DON HENLEY, GLENN FREY, JOE WALSH & TIMOTHY B. SCHMIT (THE EAGLES); JIMMY BUFFETT, KENNY "BABYFACE" EDMONDS; MICKEY HART AND BILL KREUTZMAN (OF THE GRATEFUL DEAD); "MYA" HARRISON, GAVIN ROSSDALE, SHERYL CROW; KIX BROOKS & RONNIE DUNN (BROOKS & DUNN); BONNIE RAITT; NATALIE MAINES, MARTIE MAGUIRE & EMILY ROBISON (THE DIXIE CHICKS); STEVIE NICKS, PHIL VASSAR, PATTY LOVELESS, REBA MCENTIRE, AVRIL LAVIGNE, DIDO, DENYCE GRAVES, TOM JONES, JESSE COLIN YOUNG, SARAH MCLACHLAN, MARTINA MCBRIDE, SAM MOORE (OF SAM & DAVE); JOE TERRY & DAVID WHITE (OF DANNY AND THE JUNIORS); BILLY PRESTON, BOZ SCAGGS, DIANA KRALL, ELVIS COSTELLO, BRIAN WILSON, KENNY ROGERS, TOM WAITS; TYLER STEWART, JIM CREEGGAN, STEVEN PAGE, ED ROBERTSON & KEVIN HEARN (BARENAKED LADIES); DERYCK WHIBLEY, DAVE BAKSH, CONE MCCASLIN & STEVE JOCZ (SUM 41); BRANDON HARGEST, BRITTANY HARGEST, CHRIS FEDUN & LESLEY MOORE (JUMP 5); BETHANY DILLON, NICHOLE NORDEMAN, AND MICHAEL W. SMITH IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF ARGUMENT 5

ARGUMENT 7

BY SANCTIONING THE DESIGN AND DISTRIBUTION OF SOFTWARE THAT HAS NO "COMMERCIALLY SIGNIFICANT" USE BUT TO INFRINGE THE CREATIVE WORKS OF OTHERS, THE NINTH CIRCUIT HAS EVISCERATED PROTECTION FOR SUCH WORKS, DOING INJUSTICE TO FUNDAMENTAL COPYRIGHT AND SECONDARY LIABILITY PRINCIPLES 7

A. The Ninth Circuit Has Read The "Substantiality" Requirement Out Of The "Substantial Noninfringing Use" Doctrine 7

B. The Ninth Circuit's Version of The "Substantial Noninfringing Use" Doctrine Does Injustice to the Primary Public Interest that Copyright Serves in Enabling Authors and Creators to Create 21

CONCLUSION 28

TABLE OF AUTHORITIES

CASES

A&M Records, Inc. v. Gen. Audio Video Cassettes, Inc.,
948 F. Supp. 1449 (C.D. Cal. 1996) 9

A&M Records, Inc. v. Napster, Inc.,
239 F.3d 1004 (9th Cir. 2001) 14, 15

Abington Textile Mach. Works v. Carding Specialists, Ltd.,
249 F. Supp. 823 (D.D.C. 1965) 10, 11

Arthrocare Corp. v. Smith & Nephew, Inc.,
310 F. Supp. 2d 638 (D. Del. 2004) 10

Atari, Inc. v. JS&A Group, Inc.,
597 F. Supp. 5 (N.D. Ill. 1983) 9, 17

C.R. Bard, Inc. v. Advanced Cardiovascular Sys., Inc.,
911 F.2d 670 (Fed. Cir. 1990) 10

Cable/Home Communication Corp. v. Network Prods., Inc., 902 F.2d 829 (11th Cir. 1990) 9

Dennison Mfg. Co. v. Ben Clements & Sons,
467 F. Supp. 391 (S.D.N.Y. 1979) 10

Ellison v. Robertson,
189 F. Supp. 2d 1051 (C.D. Cal. 2002),
aff'd in part, rev'd in part on other grounds,
357 F.3d 1072 (9th Cir. 2004) 19

Fortnightly Corp. v. United Artists Television, Inc.,
392 U.S. 390 (1968) 21

Fromberg, Inc. v. Thornhill,
315 F.2d 407 (5th Cir. 1963) 10

Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.,
443 F.2d 1159 (2d Cir. 1971) 19

Harper & Row, Publishers, Inc. v. Nation Enters.,
471 U.S. 539 (1985) 22

Hoffman-La Roche Inc. v. Promega Corp.,
No. C-93-1748-VRW, 1994 U.S. Dist. LEXIS
10174 (N.D. Cal. June 13, 1994) 10

In re Aimster Copyright Litig.,
252 F. Supp. 2d 634 (N.D. Ill. 2002) 6, 15, 17

In re Aimster Copyright Litig.,
334 F.3d 643 (7th Cir. 2003), *cert. denied sub nom, Deep v. Recording Indus. Ass'n Inc.*
124 S. Ct. 1069 (2004) ..... *passim*

MGM Studios, Inc. v. Grokster Ltd.,
259 F. Supp. 2d 1029
(C.D. Cal. 2003) 11, 12, 13, 15

MGM Studios, Inc. v. Grokster Ltd.,
380 F.3d 1154 (9th Cir. 2004) 5, 11, 13, 14, 15

Marsh-McBirney, Inc. v. Jennings,
No. CV 90-6370 WDK, 1991 U.S. Dist. LEXIS
20433 (C.D. Cal. Nov. 8, 1991) 10

Mazer v. Stein,
347 U.S. 201 (1954) 21, 22

Nintendo Inc. v. Computer & Entm't, Inc.,
No. C96-0187-WD, 1996 U.S. Dist. LEXIS 20975 (W.D. Wash. May 31, 1996) 17

Oxy Metal Indus. Corp. v. Quin-Tec, Inc.,
No. 80-73678, 1982 U.S. Dist. LEXIS 16861 (E.D. Mich. June 8, 1982) 10

Playboy Enters., Inc. v. Webbworld, Inc.,
991 F. Supp. 543 (N.D. Tex. 1997), *aff'd mem.*, 168 F.3d 486 (5th Cir. 1999) 19

Quality King Distribs., Inc. v. L'anza Research Int'l., Inc., 523 U.S. 135 (1998) 22

Reynolds Metals Co. v. Aluminum Co.,
457 F. Supp. 482 (N.D. Ind. 1978), *rev'd on other grounds*, 609 F.2d 1218 (7th Cir. 1979), *cert. denied*, 446 U.S. 989 (1980) 10

Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.,
256 F. Supp. 399 (S.D.N.Y. 1966) 19

Shumaker v. Gem Mfg. Co.,
311 F.2d 273 (7th Cir. 1962) 10

Sony Corp. v. Universal City Studios, Inc.,
464 U.S. 417 (1984) ..... *passim*

Twentieth Century Music Corp. v. Aiken,
422 U.S. 151 (1975) 21

United States v. Carroll Towing Co.,
159 F.2d 169 (2d Cir. 1947) 20

U. S. Fidelity & Guaranty Co. v. Plovidva,
683 F.2d 1022 (7th Cir. 1982) 20

United States v. Paramount Pictures, Inc.,
334 U.S. 131 (1948) 21

Universal Pictures Co. v. Harold Lloyd Corp.,
162 F.2d 354 (9th Cir. 1947) 19, 20

Vault Corp. v. Quaid Software, Ltd.,
847 F.2d 255 (5th Cir. 1988) 17

Worlds of Wonder, Inc. v. Vector Intercont'l, Inc.,
No. C86-2671, 1986 U.S. Dist. LEXIS 15879 (N.D. Ohio Dec. 30, 1986) 17

STATUTES

35 U.S.C. § 271(b) 11

U.S. CONST. art. I, § 8, cl. 8 ..... 7, 22

OTHER AUTHORITIES

Copyright Term Extension Act of 1995: Hearing on H.R. 989 before the Subcomm. on Courts & Intellectual Prop. of the House of Representatives Comm. on the Judiciary, 1995 WL 418350 (F.D.C.H.) (July 13, 1995) (statement of Quincy Jones) 25

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Jesse M. Feder, *Is Betamax Obsolete?: Sony Corp. of America v. Universal City Studios, Inc. in the Age of Napster*, 37 Creighton L. Rev. 859, 899 (June 2004) 17

M. WILLIAM KRASILOVSKY & SYDNEY SHEMEL, THIS BUSINESS OF MUSIC: THE DEFINITIVE GUIDE TO THE MUSIC INDUSTRY (9th ed. 2003) 4

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RESTATEMENT 3D OF TORTS: PRODUCT LIABILITY, § 2(b) 20

RICHARD POSNER, ECONOMIC ANALYSIS OF LAW § 6.1 (4th ed. 1992) 20

Copyright Law Revision: Hearings Before the Subcomm. On Patents, Trademarks, & Copyrights of the Comm. on the Judiciary on S. 1006, 89th Cong., 1st Sess. 65 (1965) (testimony of Register of Copyrights Abraham Kaminstein) 23

THE FEDERALIST NO. 43 (Mod. Lib. ed. 1941) 22

INTEREST OF THE AMICI CURIAE[1]

Amicus the non-profit National Academy of Recording Arts & Sciences, Inc. (the "Recording Academy" or "Academy") has, for nearly fifty years, represented the myriad individuals who contribute to the creation and exploitation of recorded music, including recording artists, musicians, songwriters, record producers, sound engineers, arrangers, narrators, writers of album notes, and conductors. While perhaps best known for its GRAMMY® Awards -- the only peer-presented awards which honor artistic achievement in all aspects of the recording industry -- the Recording Academy has established itself as the preeminent musical arts outreach and advocacy organization in the country. Among its many activities are its creation of the website "What's the Download" (whatsthedownload.com), which advocates and encourages music fans to engage in lawful, authorized downloading of music through the internet. Through its affiliated MusiCares Foundation and GRAMMY Foundation, and its unique network of field offices across the country, the Academy advocates on behalf of its over 18,000 members, representing the music community on such critical issues as protection of intellectual property rights, record piracy, and freedom of expression, and supports archival programs to preserve the recorded musical heritage of the United States.

Amicus Recording Artists' Coalition ("RAC") is a non-profit public-advocacy organization comprised of over 130 well-known featured recording artists, including Jimmy Buffet, Sheryl Crow, Don Henley, Billy Joel, Alanis Morisette, Stevie Nicks, Bonnie Raitt, Bruce Springsteen,

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[1] Counsel for the Petitioners and Respondents have consented to the filing of this brief. Their consent letters have been filed with the clerk of the Court. No counsel for a party in this Court authored this brief in whole or in part, and no person or entity, other than the Recording Academy and the Recording Artists Coalition as *amici curiae*, made a monetary contribution to the preparation or submission of this brief.

and Trisha Yearwood. RAC is primarily concerned with political, legal, and business issues affecting the interests of recording artists, both on a federal and state level.

Amicus the Country Music Association, Inc. ("CMA") is a not-for-profit, member-based trade association dedicated to the advancement and promotion of country music as an art form throughout the United States and the world. CMA's nearly 6,000 members include songwriters, music publishers, record producers, recording artists, record companies, and merchandisers, who compose, produce, record, manufacture, distribute and sell copies of recorded country music. Other members of the CMA include advertisers and publicists, personal and business managers, talent agents, buyers, concert promoters, television and video producers, and radio broadcasters.

Amicus the Gospel Music Association ("GMA") is a trade organization dedicated to promoting and celebrating all forms of gospel music. GMA boasts approximately 20 organizational members and more than 4,000 individual members, including more than 500 artists, 125 songwriters, and 200 agents and managers. GMA members also include publicists, music publishers, record producers, and radio programmers. Nearly 3,000 of GMA's members earn all or most of their living in the music business. Nearly 700 are employed by record companies.

Amicus the Hip-Hop Summit Action Network is the largest non-profit coalition of hip-hop artists and recording industry executives in the nation, and is dedicated to the empowerment of youth through the positive power of hip-hop music and culture. Hip-Hop Summit Action Network represents the interests of artists who are financially injured by, and has long supported the recording industry's efforts to stop, the illegal piracy of recorded music.

Amicus Jazz Alliance International, Inc. is a wholly-owned subsidiary of the International Association for Jazz Education and is dedicated to expanding the audience and

visibility of jazz and, through education, leadership, and advocacy, seeks to raise the profile of the jazz art form and foster better working relationships within the global jazz community. The Board consists of members from both the not-for-profit and for-profit sectors and includes the foremost decision-makers and stake-holders in jazz education, the music industry, journalists and the media, retail, performing-rights groups, world-renowned jazz festival organizations, booking agencies, and artistic circles.

Amicus the Rhythm & Blues Foundation is the only independent non-profit service organization solely dedicated to the historical and cultural preservation of Rhythm & Blues music. The Foundation provides financial support, medical assistance, and educational outreach through various grants and programs to support R&B and Motown artists of the 1940s through 1970s. The Rhythm & Blues Foundation is committed to "Preserving America's Soul" and to serving those who enriched our lives with their music.

Amicus SESAC, Inc. ("SESAC") is a musical performing rights society, which serves both the creators and the users of nondramatic musical works through licensing and royalty collection and distribution. SESAC licenses the public performance of more than a quarter of a million songs on behalf of its thousands of affiliated songwriters, composers, and music publishers. SESAC is one of three performing rights societies recognized under the Copyright Act. Established in 1930, SESAC is the second oldest and fastest growing performing rights society in the United States.

The fifty-four individual recording artists whose names appear on the cover of this brief also join as *amici*. Each of these artists has, at one time or another, been signed to a major-label or nationally-distributed independent label recording contract.

* * *

It is true that even successful artists suffer economic loss when recorded music is downloaded and enjoyed, but not

purchased. But that tells only half of the story. While a few creators in the music business do earn substantial livings, many more struggle to survive despite being gifted songwriters, musicians or vocalists who work hard at their craft.[2] The difficulties traditionally associated with succeeding in the music industry are becoming almost insurmountable for all but a few artists because of businesses like Grokster. If Respondents are allowed to continue to facilitate the illegal, free downloading of copyrighted music, the record industry will be unable to risk experimentation, and only the lowest-risk projects will be green-lighted.[3]

Moreover, what often gets overlooked is that the livelihoods of those who work behind the scenes to help the "stars" make great records -- the background musicians, record producers, sound engineers, conductors, arrangers, and writers of album notes, to name a few -- are directly threatened by the massive, unfettered copyright infringement being fostered by businesses like Grokster. Songwriters, including those represented by *amicus* SESAC, are also affected. The members of the Academy and the other *amici* organizations derive much of their livelihood and income from the sale of copies of recorded music and/or the successful exploitation of recorded music (which is driven by record sales), and they suffer when recorded music is downloaded but not purchased. In fact, countless members of the Academy and the other *amici* organizations have lost their jobs with record companies, or seen their contracts not renewed, because of the dramatic downturn in the music business due to such infringement.

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[2] *See* M. WILLIAM KRASILOVSKY & SYDNEY SHEMEL, THIS BUSINESS OF MUSIC: THE DEFINITIVE GUIDE TO THE MUSIC INDUSTRY (9th ed. 2003) at 7 ("out of the 27,000 records released in the United States annually about 10 percent are profitable").

[3] *See id.* at 69-70 (counterfeiters and pirates "don't have to make up for the 85 percent of recordings released in the United States annually that, according to the RIAA, fail to make a profit.").

Regardless of the level of commercial and financial success which any of these individuals have achieved, they all have at least one thing in common -- protection of their copyrights is crucial to their ability to earn a living. Respondents, whose businesses are predicated largely on copyright infringement, and are national in scope, have been granted a license by the Circuit Court to misappropriate the creative output of the musical community. The Circuit Court's decision defies the original intent of the Framers, as reflected in the Constitutional mandate that copyrights be protected so that creators may earn a living from their endeavors -- a mandate which was designed to serve public ends by ensuring the availability of creative works, and which thus far has yielded great economic and cultural benefits to our society. The decision eviscerates traditional principles of secondary copyright infringement liability by immunizing Respondents from any liability for the massive infringement they foster and facilitate, threatens to destroy the ability of musical artists and others to sustain themselves economically through the creation and authorized exploitation of their recorded works, and does irreparable, nationwide harm to the ability of creators to protect the quality and artistic integrity of their works.

SUMMARY OF ARGUMENT

The Ninth Circuit's opinion[4] eviscerates traditional secondary liability principles and immunizes the Respondents' distribution of software that was designed and is overwhelmingly used to infringe copyrighted music and movies on a massive scale. It does so by reading the "substantiality" requirement out of the "substantial noninfringing use" test, immunizing parties from secondary liability so long as the product at issue is capable of *any* noninfringing use -- even if the extent of that use is hypothetical, vanishingly small, or commercially insignificant.

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[4] *MGM Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154 (9th Cir. 2004).

Compounding this problem, the Ninth Circuit has created a "Catch 22" of epic proportions which makes evidence of *any* noninfringing use a complete defense to a finding of copyright infringement. According to the court, where a software device qualifies as a "staple article of commerce," in order to establish secondary liability the copyright owner must give the software provider notice of specific infringements resulting from the use of the software. But the court states that such notice, even if provided, would come too late because by that time the software provider could not prevent the infringement. Thus, no amount of proof would ever suffice to establish secondary liability against the provider of software that was clearly designed as an infringement machine, notwithstanding undisputed proof that, in actual use, the software was used overwhelmingly for infringement.

This holding conflicts with the opinion of a sister Circuit[5] and defies the rulings of this Court.[6] The Ninth Circuit's opinion further rejects the commonsense principle -- recognized by Judge Posner in *Aimster*, and in other areas of the law and as a matter of sound policy -- that where parties are uniquely positioned to prevent harm to others at low cost to themselves, they must take those actions, and should not be rewarded for affirmatively burying their heads in the sand.

The Ninth Circuit's decision sanctions Respondents' deliberate building of a business whose commercial success -- indeed, its very existence -- is tied to being able to attract as many "eyeballs" as possible to their services with the "draw" of being able to download copyrighted music and movies for free, and, at the same time, destroys the ability of creators and others who make their living from the sale of recorded music to sustain themselves economically. This

[5] *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003), *cert. denied sub nom. Deep v. Recording Indus. Ass'n, Inc.* 124 S. Ct. 1069 (2004).

[6] *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

defies the fundamental principle -- enshrined in the Constitution itself -- that creative output is a necessary part of this country's economic and cultural "Progress,"[7] and that such "Progress" will cease if creators and the technical teams that support them cannot earn a livelihood through their creative efforts.

Accordingly, it is essential that this Court reverse the decision below.

ARGUMENT

BY SANCTIONING THE DESIGN AND DISTRIBUTION OF SOFTWARE THAT HAS NO "COMMERCIALLY SIGNIFICANT" USE BUT TO INFRINGE THE CREATIVE WORKS OF OTHERS, THE NINTH CIRCUIT HAS EVISCERATED PROTECTION FOR SUCH WORKS, DOING INJUSTICE TO FUNDAMENTAL COPYRIGHT AND SECONDARY LIABILITY PRINCIPLES

A. The Ninth Circuit Has Read The "Substantiality" Requirement Out Of The "Substantial Noninfringing Use" Doctrine

More than twenty years ago, this Court was faced with a new technology -- the videotape recorder or "VTR" -- that enabled consumers to, on the one hand, make unauthorized reproductions of copyrighted television programs, but also, on the other hand, to record free television programs "broadcast on the public airwaves"[8] that they could not watch as they were being televised, so they could be "watch[ed] once at a later time," a practice known as "time-shifting."[9] The respondents -- owners of less than 10% of the copyrighted content available on commercial television stations -- sought to hold the manufacturer and distributor of

[7] U.S. CONST. art. I, § 8, cl. 8.

[8] *Sony*, 464 U.S. at 419.

[9] *Id.* at 421.

the VTR directly and secondarily liable for consumers' copyright infringement.

The district court in *Sony* found that "the average member of the [viewing] public uses a VTR *principally*" to engage in "time-shifting," and, moreover, that such "time-shifting may enlarge the total viewing audience and that many producers [of television programming] are willing to allow private time-shifting to continue, at least for an experimental time period."[10] This Court further concluded that even unauthorized "time-shifting" for private, home use was presumptively a "fair use," because the copyright-holder respondents had failed to demonstrate that the practice was likely to cause any real harm to the potential market for, or the value of, their works.[11] Notably, that decision was limited to private time-shifting of free television broadcasts: "No issue concerning the transfer of tapes to other persons, the use of home-recorded tapes for public performances, or the copying of programs transmitted on pay or cable television was raised."[12]

The Court in *Sony* was thus faced with the competing interests of copyright owners who require effective protection against infringement of copyrighted content, and consumers who wished only to "time-shift" from broadcast programming,[13] taking into account those copyright owners who did not object to "time-shifting," and device manufacturers who wished "to engage in [a] substantially

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[10] *Id.* at 421, 443 (emphasis added). There was evidence that approximately 75% of the copies made with VTRs had been made for purposes of time-shifting. *Id.* at 424 n.4.

[11] *Id.* at 447-456.

[12] *Id.* at 425.

[13] The Court echoed the concern of the district court that "[a]n injunction would deprive the public of the ability to use the Betamax for . . . noninfringing off-the-air recording." *Id.* at 443.

unrelated area[] of commerce," that is, to meet the significant noninfringing demand.[14]

To balance these competing interests based on the record before it, the Court borrowed the "staple article of commerce" doctrine from patent law, holding that "the sale of copying equipment [like the VTR], like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes."[15] Thus, the question presented in *Sony*, as framed by this Court, was whether the VTR was "capable of *commercially significant* noninfringing uses."[16] On the facts before it, it was unnecessary for the Court to define just how much use was "commercially significant" because the standard was plainly satisfied by the primary use of the VTR before the Court: "private, non-commercial time-shifting in the home."[17]

Later decisions, following *Sony*, defined this standard to require something more than *in*substantial noninfringing use.[18] Likewise, courts applying the doctrine in patent cases,

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[14] The Court was concerned that "the business of supplying the equipment that makes such copying feasible . . . not be stifled simply because the equipment is used by some individuals to make unauthorized reproductions of respondents' works." *Id.* at 446.

[15] *Id.* at 442 (emphasis added).

[16] *Id.* (emphasis added).

[17] *Id.*

[18] *See, e.g., Cable/Home Communication Corp. v. Network Prods., Inc.*, 902 F.2d 829, 846 (11th Cir. 1990) (defining substantial noninfringing use as "'wide use 'for legitimate, unobjectionable purposes'"); *A&M Records, Inc. v. Gen. Audio Video Cassettes, Inc.*, 948 F. Supp. 1449, 1456 (C.D. Cal. 1996) (use of device for noninfringing purposes such as recording non-copyrighted works was insubstantial compared to the number of defendant's customers who used device to counterfeit); *Atari, Inc. v. JS&A Group, Inc.*, 597 F. Supp. 5, 8 (N.D. Ill. 1983) (while defendant's PROM BLASTER could be used for the infringing purpose of copying games distributed by the plaintiff, and for the noninfringing

where the doctrine originated, found that the "quality, quantity and efficiency of the suggested alternate [noninfringing] uses are to be considered,"[19] and that "occasional," "aberrant," or "hypothetical" uses do not suffice.[20] Indeed, they also refused to apply the doctrine where it was plain that the maker knew of, and sought to capitalize on, the infringing application of its device.[21] This

purpose of copying games distributed by the defendant itself, the latter use was insubstantial given that defendant sold only nine games).

[19] *Reynolds Metals Co. v. Aluminum Co.*, 457 F. Supp. 482, 509 (N.D. Ind. 1978), *rev'd on other grounds*, 609 F.2d 1218 (7th Cir. 1979), *cert. denied*, 446 U.S. 989 (1980); *Oxy Metal Indus. Corp. v. Quin-Tec, Inc.*, No. 80-73678, 1982 U.S. Dist. LEXIS 16861, at *25 (E.D. Mich. June 8, 1982).

[20] *See, e.g., Hoffman-La Roche Inc. v. Promega Corp.*, No. C-93-1748-VRW, 1994 U.S. Dist. LEXIS 10174, at *29 (N.D. Cal. June 13, 1994) (rejecting argument that, in order to be found a non-staple, a device must have "absolutely no significant potential noninfringing use;" "[t]here must be a quantitative element . . . . Whether a use is 'substantial' or not depends on how likely and often the use will occur"); *Dennison Mfg. Co. v. Ben Clements & Sons*, 467 F. Supp. 391, 427 (S.D.N.Y. 1979) (defendant's proffered noninfringing uses were "occasional" and "aberrant" and product was clearly designed to be used in an infringing manner); *Arthrocare Corp. v. Smith & Nephew, Inc.*, 310 F. Supp. 2d 638, 657 (D. Del. 2004) ("occasional and aberrant" noninfringing uses do not rise to the level of substantial noninfringing use); *Fromberg, Inc. v. Thornhill*, 315 F.2d 407, 414 (5th Cir. 1963) (rejecting staple article defense where noninfringing use was a "limited use of little practical consequence in contrast to the number" of devices being used to infringe); *Marsh-McBirney, Inc. v. Jennings*, No. CV 90-6370 WDK, 1991 U.S. Dist. LEXIS 20433, *16 (C.D. Cal. Nov. 8, 1991) (rejecting defendants staple article defense because defendant's proffered noninfringing uses were hypothetical in nature); *cf. C.R. Bard, Inc. v. Advanced Cardiovascular Sys., Inc.*, 911 F.2d 670, 674 (Fed. Cir. 1990) (device a staple article where 40-60% of the uses of the defendant's device did not infringe on the plaintiff's patented methods).

[21] *See, e.g., Shumaker v. Gem Mfg. Co.*, 311 F.2d 273, 276 (7th Cir. 1962) (defendant's device was not capable of substantial noninfringing uses where defendant advertised and sold its product with directions and diagrams for using it in an infringing manner); *Abington Textile Machinery Works v. Carding Specialists, Ltd.*, 249 F. Supp. 823, 849-50

is consistent with the doctrine, codified in the very patent law provision from which *Sony* derived the substantial noninfringing use doctrine, that a party can be held liable for 'active inducement' of a patent infringement."[22] Indeed, there is nothing in *Sony* that compels a court to immunize from liability a supplier that distributes an article of software that has substantial noninfringing uses, where the supplier engages in conduct that constitutes a knowing inducement to infringe.

In *Grokster*, the Ninth Circuit was confronted with a technology that is indisputably used primarily -- indeed, overwhelmingly -- to infringe. The Petitioners submitted uncontested evidence that *at least* ninety percent of the material on Respondents' services is infringing.[23] The Ninth Circuit recognized that not even the Respondents seriously dispute that "the vast majority of the files" exchanged on Respondents' services "are exchanged illegally in violation of copyright law."[24]

The euphemism "file sharing" does not effectively capture the true nature of the infringing activity, which involves unauthorized reproduction of the entirety of numerous copyrighted works and the distribution of copies to others, who are equally capable of copying and retransmitting them, *ad infinitum*. A "massive volume" of evidence demonstrated that Respondents "clearly know that many if not most of those individuals who download their software subsequently use it to infringe copyrights."[25]

(D.D.C. 1965) (product could "hardly be regarded as" a staple article where it was especially made to, and was sold in a package which included everything needed to, infringe plaintiff's patented process).

[22] *See* 35 U.S.C. § 271(b).

[23] *See MGM Studios, Inc.*, 380 F.3d at 1158, 1162.

[24] *Id.* at 1160.

[25] *MGM Studios, Inc. v. Grokster Ltd.*, 259 F. Supp. 2d 1029, 1036-37 (C.D. Cal. 2003).

Further, the commercial success of Respondents' business depends on attracting as many "eyeballs" as possible to their services, with the "draw" of being able to illegally download copyrighted music and movies for free.[26] Not surprisingly, this "draw" has resulted in an economic windfall to the Respondents.[27] Indeed, the district court concluded that there was a very real possibility that Respondents "may have intentionally structured their businesses to avoid secondary liability for copyright infringement, while benefiting financially from the illicit draw of their wares."[28] At the same time, there was never any showing that any of the claimed noninfringing uses attracted users or, ultimately, advertisers, which are critical to the success of Respondents' business.

Nevertheless, the district court and the Ninth Circuit immunized Respondents' conduct by applying a perverse interpretation of *Sony*'s "substantial noninfringing use"

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[26] *Id.* at 1043 ("Here, it is clear that Defendants derive a financial benefit from the infringing conduct. The ability to trade copyrighted songs and other copyrighted works certainly is a 'draw' for many users of Defendants' software. As a result, Defendants have a user base in the tens of millions.").

[27] *Id.* at 1044 & n. 11 ("Defendants derive substantial revenue from advertising. For example, StreamCast had $1.8 million in revenue in 2001 from advertising. . . . And as of July of 2002, StreamCast had $2 million in revenue and projects $5.7 million by the end of the year. . . . Grokster also derives substantial revenue from advertising. . . . The more individuals who download the software, the more advertising revenue Defendants collect. And because a substantial number of users download the software to acquire copyrighted material, a significant proportion of Defendants' advertising revenue depends upon the infringement. Defendants thus derive a financial benefit from the infringement. . . . This conclusion is essentially undisputed by Defendants.") (Internal citations omitted.) One can only assume that if the uncertainty over the legality of Respondents' software is removed by an affirmance here, the business of Respondents and others will expand exponentially, as will the destructive copyright infringement which those businesses foster and facilitate.

[28] *Id.* at 1046.

doctrine. The Respondents submitted declarations that there are noninfringing uses of their software (a handful of copyright owners stated that they consent to having their works distributed via the software; others claimed to use the software to distribute public domain or non-copyrighted works). The district court recited those noninfringing uses and concluded that they were "substantial" without articulating the standard by which it reached that determination.[29] Its treatment of the issue was entirely conclusory. The Ninth Circuit affirmed, relying on these same declarations, and refusing to even consider Petitioners' evidence which established that the vast majority of the software's use is for infringement. According to the court, to do so would "misapprehend[] the *Sony* standard as construed in *Napster I*, which emphasized that in order for limitations imposed by *Sony* to apply, a product need only be *capable* of substantial noninfringing uses."[30]

Neither the district court nor the Ninth Circuit attempted to assess the substantiality of the actual or potential noninfringing uses either in absolute terms or relative to the amount of infringing use. Nor did either court attempt to assess the commercial significance of those uses to the Respondents' service. Indeed, by concluding that Petitioners' copyrighted works were the "draw" that resulted in Respondents having a user base in the tens of millions, the district court implicitly found that these noninfringing uses were not in the least commercially significant to Respondents' service.

Grokster, therefore, stands for the proposition that *any* showing of noninfringing use, no matter how commercially insubstantial, will result in the application of a standard for a finding of contributory liability that is virtually impossible to meet. That approach is not supported by *Sony*, which drew

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[29] *Id.* at 1035.

[30] 380 F.3d at 1162 (emphasis in original).

the line at "substantial," "commercially significant" noninfringing use, not at *any* noninfringing use.

The Ninth Circuit compounded this profound error by creating a "Catch 22" in the standard of knowledge to which Respondents were to be held. According to the Ninth Circuit, where a device qualifies as a "staple item" within the meaning of *Sony*, more than "constructive" knowledge of its potentially infringing use must be established.[31] However, at the point in time before Respondents released their software, there was no actual instance of infringement that could be proved to result from the use of that software.[32] Once the software is released, and actual instances of infringement resulting from the use of the software occur, providing specific notice of those infringements to Respondents would be too late, said the Ninth Circuit, because the software was effectively put into the hands of the public, and the software's maker arguably had no further control over its use.[33] This approach appears nowhere in *Sony* or in the law of secondary liability, but is derived solely from the Ninth Circuit's interpretation of its own decision in *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1021 (9th Cir. 2001).

The Ninth Circuit's standard can never be met where a defendant deliberately designs its software so that -- unlike other peer-to-peer services such as *Napster* -- it avoids knowledge of particular files being traded, and cannot know of a specific instance of infringement unless notified by a copyright holder, by which point in time it would, according to the court, be too late. In these circumstances, no amount of proof would ever suffice to establish secondary liability against the maker of software that was clearly designed as an infringement machine, notwithstanding undisputed proof that, in actual use, the device was used overwhelmingly for

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31 *Id.* at 1161.

32 *Id.* at 1162.

33 *Id.* at 1162-63.

infringement. In this way, the Ninth Circuit made evidence of *any* noninfringing use a complete defense to a finding of secondary copyright infringement liability. Indeed, the fallacy of this approach ultimately led the Ninth Circuit to the absurd conclusion that Respondents' software did not even 'materially contribute' to the infringing activities of its users.[34]

The Ninth Circuit's failure in *Grokster* to make any attempt to assess the substantiality of the actual or potential noninfringing uses, or to assess the commercial significance of those uses, violates not only the letter, but also the purpose of the "substantial noninfringing use" standard as articulated by this Court in *Sony*. It is also inconsistent with the decisions of other courts that have applied the doctrine in the copyright context since *Sony* -- including the Seventh Circuit's decision in *Aimster* -- as well as its application in the related field of patent law, from which the doctrine originates.[35]

The Seventh Circuit in *Aimster* correctly recognized the purpose of the "substantial noninfringing use" doctrine in the context of a peer-to-peer technology that was used primarily to infringe.[36] There, as in *Napster* and *Grokster*, it was "unequivocally established that Aimster's users [were] engaged in direct copyright infringement."[37] Like the Respondents, Aimster took steps to ensure that it could not identify the content of specific files in an effort to avoid having the requisite knowledge to establish contributory liability.[38] And, while the Seventh Circuit recognized that Aimster, like Grokster and StreamCast, could be used for

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34 *Id.* at 1163.

35 *See* cases *supra*, notes 18-21.

36 *See In re Aimster Copyright Litig.*, 334 F.3d 643.

37 *In re Aimster Copyright Litig.*, 252 F. Supp. 2d 634, 648 (N.D. Ill. 2002).

38 *Id.* at 641.

noninfringing purposes,[39] that Court refused to hold that this, alone, was sufficient for Aimster to avoid liability:

> Were that the law, the seller of a product or service used *solely* to facilitate copyright infringement, though it was capable in principle of noninfringing uses, would be immune from liability for contributory infringement. That would be an extreme result, and one not envisaged by the *Sony* majority.[40]

What *Sony* required was a weighing of infringing and noninfringing uses: "when a supplier is offering a product or service that has noninfringing as well as infringing uses, some estimate of the respective magnitudes of these uses is necessary for a finding of contributory infringement."[41] Because Aimster failed to produce any evidence that its service had ever been used for a noninfringing use, "let alone evidence concerning the frequency of such uses," its staple article defense failed.[42]

The question of where the line should be drawn between substantial and insubstantial, and commercially significant and insignificant, noninfringing use is, ultimately, for the Court to decide. The Ninth Circuit did not draw a line, but instead read "substantiality" and "commercially significant" out of the test altogether. *Any* noninfringing use would appear to satisfy that test.

Although the *Sony* majority found it unnecessary to define just how much use was "commercially significant" in light of the fact that the VTR was predominantly used for time-shifting, Justice Blackmun noted, in dissent, that "if no one would buy the product for noninfringing purposes alone, it is clear that the manufacturer is purposely profiting from

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39 *See* 334 F.3d at 652.

40 *Id.* at 651.

41 *Id.* at 649.

42 *Id.* at 653.

the infringement, and that liability is appropriately imposed."[43] Thus, one way in which a court can assess the substantiality of a noninfringing use is to consider the market for that use.[44] Because Respondents give their software away for free, and the software is paid for by advertising revenue, the Ninth Circuit could have considered whether the stated noninfringing uses would generate enough "eyeballs" to sustain the viability of Respondents' business model in the absence of the infringing uses (which the district court had conceded were the "draw" attracting Respondents' sizable user base).[45] Instead, it adopted a test which, contrary to the letter and purpose of the substantial noninfringing use doctrine as articulated in *Sony*, makes evidence of any noninfringing use a complete defense to a finding of secondary copyright infringement liability.

The Ninth Circuit also should have refused -- as Judge Posner did in *Aimster* -- to sanction Grokster's "ostrich-like refusal to discover the extent to which its system was being used to infringe."[46] The record was replete with evidence that Grokster, like Aimster, deliberately devised its system to

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43 *Sony*, 464 U.S. at 491 (Blackmun, J., dissenting).

44 *See also Worlds of Wonder, Inc. v. Vector Intercont'l, Inc.*, No. C86-2671, 1986 U.S. Dist. LEXIS 15879, at *3-4 (N.D. Ohio Dec. 30, 1986) (although defendant's tapes had noninfringing uses, those uses were not substantial where commercial value of tapes depended on their infringing use); *Nintendo Inc. v. Computer & Entm't, Inc.*, No. C96-0187-WD, 1996 U.S. Dist. LEXIS 20975, at *6 (W.D. Wash. May 31, 1996) (although it was "technically possible" to use defendant's product for certain noninfringing uses, purchasers were not likely to do so given less expensive alternatives); *Atari*, 597 F. Supp. at 8 (same); *cf. Vault Corp. v. Quaid Software, Ltd.*, 847 F.2d 255, 262 (5th Cir. 1988) (viable commercial market existed for noninfringing use of product: making back-up copies of copyrighted software).

45 *See* Jesse M. Feder, *Is Betamax Obsolete?: Sony Corp. of America v. Universal City Studios, Inc. in the Age of Napster*, 37 CREIGHTON L. REV. 859, 899 (June 2004).

46 *See In re Aimster*, 334 F.3d at 655.

avoid actual knowledge of precisely what files its users were copying, in an effort to avoid secondary liability. Because Grokster "blinded itself in the hope that by doing so it might come within the rule of the *Sony* decision," "[i]t must take responsibility for that self-inflicted wound."[47]

The record demonstrates that Grokster could have, but chose not to, implement filtering software that would have curtailed copyright infringement on its network. This filtering software would not have interfered with Grokster's tiny fraction of noninfringing material.[48] Thus, there is simply no legitimate technological, economic, or practical reason why Grokster could not have implemented it.

The record also shows that Grokster's lack of control over its users' infringement is a relatively recent innovation. Early iterations of Grokster were quite similar to Napster -- they featured a centralized server that gave Grokster knowledge and control over its users' activities.[49] Only after Napster was found secondarily liable for copyright infringement did Grokster abandon this centralized model.[50] Even then, however, Grokster *still* maintained the ability to eject users from the network; it took yet *another* iteration of

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[47] *See id.* at 653-54.

[48] *See* J.A. 228-232 (Ikezoye Decl.) and J.A. 181-88 (Breslin Decl.) (several vendors offer filtering technologies that can prevent transfer of unauthorized works); J.A. 181-88 (Breslin Decl.) (blocking could be accomplished "without any significant degradation in the [peer-to-peer] system"). *See also* J.A. 253, 274-75(Grokster and Streamcast both have implemented filters that eliminate pornographic files, viruses, and spoof files); Darrell Smith, *The File Sharing Dilemma*, CNet News (Feb. 3, 2004) (comment of Streamcast's former Chief Technology Officer that "there are no technical limitations to the ability to filter" copyrighted content and "the question is not whether file-sharing companies can filter, but whether they will."). *See generally* MGM Plaintiffs-Appellants Opening Brief On Appeal to the Ninth Circuit (August 18, 2003) ("Pls. Appeal Br."), at 18-21, 58-62, and record material cited therein.

[49] *See* Pls. Appeal Br. at 10, 62-63, and record material cited therein.

[50] *See id.* at 10-11 and record material cited therein.

the software for Grokster to become fully blind to its users' activities and fully deprived of the ability to control those activities.[51] Thus, Grokster not only *can* control its users' illegal activities at reasonable cost, it *actually had* such control in the past. It was only when the law made clear that such control imparted certain responsibilities that Grokster redesigned its system deliberately to avoid those responsibilities.

Judge Posner's focus on "the ability of a service provider to prevent its customers from infringing"[52] accords with both logic and law. Where a party can take relatively easy steps to prevent foreseeable harm, but affirmatively chooses not to do so, it should be held to account.[53] Tort law, from which secondary liability in copyright derives,[54] has long

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[51] *See id.*, at 11-13, 18, 63, and record material cited therein.

[52] 334 F.3d at 648. Judge Posner concluded that "[e]ven when there are noninfringing uses of an Internet file-sharing service, . . . if the infringing uses are substantial then to avoid liability as a contributory infringer the provider of the service must show that it would have been disproportionately costly for him to eliminate or at least reduce substantially the infringing uses." *Id.* at 653.

[53] *See Playboy Enters., Inc. v. Webbworld, Inc.*, 991 F. Supp. 543 (N.D. Tex. 1997), *aff'd mem.*, 168 F.3d 486 (5th Cir. 1999) (finding vicarious liability and rejecting defendant's argument that he did not have the ability to control the bots that automatically trolled the internet for visual images because it was the defendant himself who programmed the software and could have changed the parameters to avoid infringement); *Ellison v. Robertson*, 189 F. Supp. 2d 1051, 1058 (C.D. Cal. 2002) (finding defendant liable where it "should have known about the infringement" but failed to do so through "its own fault," and noting that a contrary rule would encourage defendants "to remain willfully ignorant in order to avoid contributory copyright infringement liability"), *aff'd in part, rev'd in part on other grounds*, 357 F. 3d 1072 (9th Cir. 2004).

[54] *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (contributory liability in copyright is predicated on common law doctrine of joint and several tort liability), *quoting Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F. Supp. 399, 403 (S.D.N.Y. 1966); *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F.2d 354, 365 (9th Cir. 1947) (writer who contributed

recognized that a party's ability to easily implement preventative measures should be considered in assessing liability.[55] Addressing the issue of secondary copyright liability from a broad economic perspective, one commentator has argued that "an efficient approach to indirect liability might start by applying a negligence rule to any activity that can lead to copyright infringement. Negligence rules are common in tort law; they hold a party liable in cases where that party's failure to take economically reasonable precautions results in a harm."[56] Applying that reasoning to infringement facilitators like Grokster, the same commentator argued that secondary copyright liability is especially appropriate when the indirectly liable parties are in a good position to prevent infringement.[57]

Grokster had the means to readily offer the public a system which would prevent infringement, while still facilitating the claimed noninfringing uses. Instead, it deliberately chose to abandon that protection so it could

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material to infringing film found "liable for damages as a contributory. . . infringer and joint tortfeasor").

[55] *See, e.g., United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947) (Hand, J.) (negligence liability in tort assessed in light of the probability of the harm, the gravity of the harm, and the cost of precautions); *U.S. Fidelity & Guaranty Co. v. Plovidva*, 683 F.2d 1022, 1026 (7th Cir. 1982) (negligence should be found where the magnitude of the loss multiplied by its probability is greater than the burden of precautions to prevent the loss); RICHARD POSNER, ECONOMIC ANALYSIS OF LAW § 6.1 (4th ed. 1992) (negligence test properly takes account of cost of precautions); RESTATEMENT 3D OF TORTS: PRODUCT LIABILITY, § 2(b) & cmts. a & d (strict liability for defective design applies when "the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design;" this "achieve[s] the same general objectives as does liability predicated on negligence.").

[56] Douglas Lichtman & William Landes, *Indirect Liability for Copyright Infringement: An Economic Perspective*, 16 HARV. J. LAW & TECH. 395, 405 (2003).

[57] *Id.* at 409.

feign ignorance of the massive, unlawful use to which its software is being put. By insulating Grokster from liability for injury which derives directly from Grokster's software, and which was foreseeable, colossal, and readily preventable, the Ninth Circuit sanctioned that choice. In doing so, the court further compounded its error in making evidence of any noninfringing use, no matter how commercially insignificant, a complete defense to a finding of infringement.

B. The Ninth Circuit's Version of The "Substantial Noninfringing Use" Doctrine Does Injustice to the Primary Public Interest that Copyright Serves in Enabling Authors and Creators to Create

In *Sony*, this Court recognized that when faced with technological change, the Court must return to basic principles.[58] The basic principle at issue here is clear: copyright's "ultimate aim" is "to stimulate artistic creativity for the general public good."[59] This central concern with the public good, enshrined in Article I, Section 8 of the Constitution, has been vindicated time and again by this Court.[60] It is thus a bedrock principle of American law -- and

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[58] *Sony*, 464 U.S. at 432. *See also Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (The copyright law must not be inflexible and must be read "in the light of drastic technological change," keeping in mind at all times that its "basic purpose" is "to stimulate artistic creativity for the general public good.") (citing *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 395-96 (1968)).

[59] *Id.* at 431-32 (quoting *Twentieth Century Music Corp.*, 422 U.S. at 156).

[60] *See, e.g., Sony*, 464 U.S. at 429 ("[T]he limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the period of limited exclusive control has expired."); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948) ("'The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.' It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius."); *Mazer v.*

indeed of American culture -- that while individual creators may be the immediate beneficiaries of copyright protection, such protection ultimately serves public, not private ends, by encouraging the creation and ensuring the availability of creative works. As James Madison observed in the Federalist Papers, "the public good [afforded by copyright] fully coincides . . . with the claims of individuals."[61]

Recorded music is vital to America's cultural heritage, as reflected in the 107 categories of GRAMMY® Awards, covering forty separate genres and groupings, including classical, jazz, gospel, blues, folk, polka, country, R&B, Latin, rock, pop, rap, dance, alternative, and blue grass music. The preservation and growth of this vital heritage depends upon an environment in which creators of recorded music can earn a living from their creative endeavors. We do not live in an era, like the Renaissance, in which artists are financially supported by a few wealthy, private patrons. Today, millions of members of the record-buying public are the "patrons." If the public is allowed to copy and distribute sound recordings without compensating the creators (and those who work with them), artists' principal means of support will vanish. The destructive consequences to our culture will follow as certainly as night follows day. As a former Register of Copyrights observed,

> The basic purpose of copyright is the public interest, to make sure that the wellsprings of creation do not dry up through lack of incentive, and to provide an

Stein, 347 U.S. 201, 219 (1954) (The "encouragement of individual effort by personal gain is the best way to achieve the public welfare through the talents of authors . . . Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered."); *Quality King Distribs., Inc. v. L'anza Research Int'l., Inc.*, 523 U.S. 135, 151 (1998) ("In construing the statute, however, we must remember that its principal purpose was to promote the progress of the 'useful Arts,' U.S. Const., Art. I, § 8, cl. 8, by rewarding creativity . . . ."); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546 (1985).

[61] THE FEDERALIST No. 43 at 279 (Mod. Lib. ed. 1941).

> alternative to the evils of an authorship dependent upon private or public patronage. As the founders of this country were wise enough to see, the most important elements of any civilization include its independent creators -- its authors, composers, and artists -- who create as a matter of personal initiative and spontaneous expression rather than as a result of patronage or subsidy. A strong, practical copyright is the only assurance we have that this creative activity will continue.[62]

Surely, Congress did not intend that the Copyright Act's core public-protective principle -- promotion of "the useful arts" through strong copyright protection for creators -- should be undercut by judicial interpretation which vitiates any remedy against those who deliberately foster copyright infringement by others. Yet the Ninth Circuit did just that, ignoring the inevitable reality that the Framers themselves recognized more than two centuries ago: when artists and authors are not compensated, both their incentive to create and, as a practical matter, their very ability to create, is undermined.[63] As acclaimed songwriter and recording artist Paul Williams testified before Congress:

> I am joined by many in this room for whom songwriting is our life's work. That is to say, it is our *life*, but it is also our *work*. The royalties we earn on songs we've written pay our bills. Put our kids through school. Enable us to plan for retirement.

[62] *Copyright Law Revision: Hearings Before the Subcomm. On Patents, Trademarks, and Copyrights of the Comm. on the Judiciary on S. 1006*, 89th Cong., 1st Sess. 65 (1965) (testimony of Register of Copyrights Abraham Kaminstein).

[63] *See* Jane Ginsburg, *Copyright Use and Excuse on the Internet*, 24 COLUM.-VLA J.L. & ARTS 1 (2001) ("Copyright owners cannot, and should not, control every Internet use, but neither should every use prompt an excuse, lest we undermine the ability of copyright owners, and especially of individual creators, to make a living from their creativity.").

> Without our copyrights, we will be economically devastated.[64]

Renowned Composer and lyricist Alan Menken similarly testified:

> While it is impossible to ascertain exactly what inspires a person to become a composer rather than a surgeon, or a dentist in my case, it is the reality of life . . . that one must work in order to support oneself and one's family. . . . If it becomes clear that insufficient copyright protection is available to provide that support, there will be less incentive to try and make one's living as a creator.[65]

And legendary songwriter Mike Stoller wrote:

> Many say that since making music is an art, artists should do it simply for the love of it. But how free can artists be to do what we love if we must spend most of our days doing something else to make a living?[66]

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[64] *Pre-1978 Distribution of Recordings Containing Musical Compositions; Copyright Term Extension; and Copyright Per Program Licenses: Hearing Before the Subcomm. On Courts and Intellectual Prop. of the House Comm. on the Judiciary*, 105th Cong. 25 (June 27, 1997) (statement of Paul Williams), *available at* http://commdocs.house.gov/committees/judiciary/hju43666.000/hju43666_0.htm#24.

[65] *See, e.g., Copyright Term Extension Act of 1995: Hearing on S. 483 before the Senate Judiciary Comm.*, 1995 WL 557177 (F.D.C.H.) (September 20, 1995) (statement of Alan Menken).

[66] Mike Stoller, Editorial, *Songs That Won't Be Written*, N.Y. TIMES, Oct. 7, 2000, at A15. Mike Stoller testified similarly below. *See* Declaration of Mike Stoller in Support of Plaintiffs' Motion for Summary Judgment, August 15, 2002, at J.A. 290, ¶¶ 11-13 ("Today, I fear for the seventeen-year-old songwriter looking forward to a career in the music business. . . . If [Defendants] get away with their thievery, it will-turn that teenager's future livelihood into a mere hobby, and, in doing so, it will ensure that fewer and fewer talented individuals can afford to devote their efforts to expanding America's musical heritage. . . . Where would I be today if, after composing "Jailhouse Rock," anyone could have recorded it, and anyone else could have copied that recording,

The advocates of those who support file sharing without compensating the creators portray the ensuing litigation as battles between "David" and "Goliath," claiming merely to be facilitating the "sharing" of music and other "content" among a "community" of users, and arguing that they are under attack by "giant" (hence "evil") record companies and music publishers who are motivated solely by "greed." Lost in this formulation, however, is the recognition that the victims here are not the developers of the software that encourages and facilitates theft. As one commentator aptly put it: "Since when did unauthorized taking . . . become 'sharing?' . . . Since when did millions of people unrelated to any common bond whatsoever except the purchase of a computer and its attachments, and a desire to take property without payment, constitute a 'community.'?"[67] By framing the debate as if the companies that are building their businesses on the backs of uncompensated creators are the "victims," the Respondents seek to shift the focus away from the ultimate victims: the public, and the creators of recorded music and those who work with them. Most of these individuals are not wealthy "superstars." They are singers, musicians, composers, producers, engineers, arrangers, technicians, and the like, who rely on revenues derived from the lawful sale of records to support themselves and their families.[68] And it is those individuals and their ability to earn

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without paying us? Probably, I would not be a professional songwriter. Probably, I would not have devoted my full-time efforts to composing and songwriting over the course of my career.").

[67] I. Fred Koenigsberg, *Humpty-Dumpty In Copyrightland*, 51 J. COPYRIGHT SOCIETY 677, 680 (Spring 2004).

[68] *See, e.g., Copyright Term Extension Act of 1995: Hearing on H.R. 989 before the Subcomm. on Courts & Intellectual Prop. of the House of Representatives Comm. on the Judiciary*, 1995 WL 418350 (F.D.C.H.) (July 13, 1995) (statement of Quincy Jones) ("[W]e must not forget that there are many songwriter/musicians, particularly blues and jazz musicians, who support themselves and their families on the royalties earned from the three or four songs that they composed.").

a living from their creative endeavors that the copyright laws are designed to protect for the benefit of our society.

It is hardly a secret that record companies have fired thousands of employees and have significantly cut back on investment and expansion plans, largely due to the downturn in record sales resulting from illegal downloading via the internet.[69] Experimentation -- the seed of most intellectual progress -- has largely been abandoned. Only low-risk music projects see the light of day. Many artists have been dropped by major labels, and for those artists remaining, promotion and tour support money has been greatly curtailed, if not eliminated entirely. Artists who would have been signed in better times are being ignored. And, for every recording artist who has been dropped or whose projects are not being funded by record companies, countless others have suffered economically as well -- the musicians and backup singers who would have been employed, graphic artists whose livelihood is derived from creating album covers, employees of recording studios, songwriters, and untold others. It cannot be reasonably disputed that the principal reason for this catastrophic harm is the proliferation of businesses like Grokster.[70]

By completely eliminating from the balance the copyright holders' "legitimate demand for effective -- not merely symbolic -- protection of the statutory monopoly,"[71] the

[69] *See, e.g.*, Ethan Smith, *Universal Music To Cut Work Force As Industry Sags*, WALL STREET J., Oct. 16, 2003, at A3 (noting that, as of late-2003, the "industrywide work force . . . ha[d] already shed nearly one in five jobs over the last few years," and that "[i]n all, nearly 8,000 jobs [had already] been stripped from the five major record companies").

[70] *See Privacy & Piracy: The Paradox of Illegal File Sharing on Peer-to-Peer Networks and the Impact of Technology on the Entertainment Industry*, 108th Cong., *reprinted at* 2003 WL 22234991 (F.D.C.H.) (Sept. 30, 2003) (testimony of Mitch Bainwol before the Senate Committee on Governmental Affairs) ("Bainwol Testimony").

[71] *Sony*, 464 U.S. at 442.

Ninth Circuit's test does injustice to the primary public interest that copyright serves in motivating authors and creators to create. And it contributes to a growing perception that is taking root nationwide: that music is free, or, worse, that infringement is acceptable conduct.[72] This threatens the livelihoods of not just big-name record artists and record companies, but the livelihoods of everyone involved in the making, presentation, and distribution of sound recordings.[73] By removing the financial incentive to create, fewer and fewer talented individuals will be able to afford to devote their efforts to expanding America's musical heritage, jeopardizing the future of music itself, to the detriment of the public, this nation, and its culture.

[72] *See* Bainwol Testimony, at 5-6 (describing the music industry's efforts to counteract this perception).

[73] We further note that artists place a premium on the quality of the recordings they distribute to the public. They devote an enormous amount of attention towards crafting the sound, which is a fundamental part of their art. Respondents have usurped for themselves a fundamental copyright right that belongs to the creator of a copyrightable work, namely, the right to control the manner and method of the work's distribution, and, hence, its artistic integrity. Respondents have become the record "store," but all of the records are free. The "record" that the user "obtains" from this store may not, however, be the "record" as the artist (and the producer and recording engineer who labored to ensure that the recording was of the highest fidelity) intended it to be heard. The quality of the "file-shared" copy is often poor, or incomplete. It may be an unauthorized and low-quality bootleg of a live recording. It could even be a mislabeled recording by a different artist altogether. The listener may never know that the defects were not the fault of the recordings' creators.

CONCLUSION

The judgment of the Ninth Circuit court of appeals should be vacated and reversed.

Respectfully submitted,

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